IN THE

# Supreme Court of the United States

OCTOBER TERM, 1967

Nos. 257 and 258

(Consolidated)

FEDERAL MARITIME COMMISSION and UNITED STATES OF AMERICA, and AMERICAN SOCIETY OF TRAVEL AGENTS, INC.,

*Petitioners,*

—against—

AKTIEBOLAGET SVENSKA AMERIKA LINIEN (SWEDISH AMERICAN LINE), *et al.*,

*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

## BRIEF FOR RESPONDENTS

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# INDEX

PAGE

## Table of Authorities

*Cases*:

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## BRIEF FOR RESPONDENTS

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### Question Presented

The real question in this case is whether an order of the Federal Maritime Commission issued under Section 15 of the Shipping Act, 1916, as amended (46 U. S. C. §814), which disapproved two fundamental provisions of steamship conference agreements, for years previously approved by the Commission and its predecessors, was properly set aside as "not supported by substantial evidence on the record considered as a whole" (R. 654).[1]

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[1] "R." refers to the printed Appendix in this Court.

## Statement of the Case

Petitioners' efforts to present this Shipping Act case as an antitrust case have not only divorced it from the record below but from the Shipping Act as well. Ignored also is the reaffirmed intent of Congress that under that Act our traditional antitrust concepts cannot be fully applied to the international commerce involved. To restore the case to a true perspective requires some attention to the unique character of the transatlantic passenger trade, the historic political and economic reasons which explain the need for steamship conferences in that trade, and the actual state of the evidence below as distinguished from the gloss petitioners put upon it.

### *The International Trade Involved*

Respondents, comprising all American and European steamship lines furnishing regular passenger liner service across the Atlantic, are members of either or both the Trans-Atlantic Passenger Steamship Conference (TAPC) and the Atlantic Passenger Steamship Conference (APC) (R. 402, 403, 414, 416, 419, 453-454). Fifteen principal maritime nations of the world, including the United States, are represented in the present membership of the conferences.[2] These conferences are the successors of similar conferences in the transatlantic passenger steamship trade long antedating the enactment of the Shipping Act in 1916 (R. 414-416, 454-455). In their present form they have been operating under conference agreements filed with and ap-

[2] Two of the 25 members of TAPC and three of the 25 members of APC are American-flag carriers (R. 403, 414, 416, 454-455). The other nations represented are Canada, France, Greece, Israel, Italy, Netherlands, Norway, Poland, Portugal, Spain, Sweden, United Kingdom, Soviet Russia and West Germany.

proved by the Commission for upwards of 40 years (Ex. 119, R. 388; R. 403, 454-455).

There have existed historically separate conferences depending upon the direction of trade routes or passenger origin, *i.e.*, inbound to the United States and Canada from Europe (westbound) and outbound from the United States and Canada to Europe and beyond (eastbound).[3] This accounts for what the Commission describes here as "overlapping" conferences (C. Br. 5)[4] and why the westbound conference has its headquarters and records in England while the eastbound conference is headquartered in New York (C. Br. 5).[5]

Another historical facet of the Atlantic passenger trade —and one which petitioners would ignore though the Commission partially recognized it (R. 486-487)—is that, because of their geographical proximity, trade to Canadian and United States ports was always considered as one.[6] The Congressional Alexander Report of 1914,[7] which led to

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[3] See S. Rep. No. 860, 87th Cong., 1st Sess., p. 4 (1961).

[4] "C. Br." refers to pages of the Commission's brief in No. 257, and "Commission" as used herein includes predecessor agencies. "A. Br." refers to pages of the brief of petitioner [illegible]erican Society of Travel Agents, Inc. (hereinafter ASTA) in [illegible]58.

[5] It also explains why one American-flag respondent, American President Lines, whose ships sail westward across the Atlantic on their return to California, is a member of APC and not a member of TAPC (R. 4[illegible]455).

[6] See also *Approved Scope of Trades Covered by Agreement 7840, as Amended—Atlantic Passenger Steamship Conference* (FMC Docket No. 66-12), reported only in 7 Pike & Fischer S. R. R. 401 (1966).

[7] House Committee on the Merchant Marine and Fisheries, *Steamship Agreements and Affiliations in the American Foreign and Domestic Trade*, H. Doc. No. 805, 63rd Cong., 2d Sess., pp. 21-48 (1914), hereinafter referred to as "Alexander Report."

the Shipping Act, 1916, contains a comprehensive analysis of the Atlantic passenger steamship conferences and agreements existing at that time. It shows that Canadian ports were uniformly included with United States ports and that there never were separate Canadian-European or United States-European passenger trades or conferences.

This substantial cross-competition for American and Canadian passenger traffic still exists as between member lines serving Canadian ports and those serving United States ports (R. 620; Ex. 96, R. 373). All member lines thus have a distinct interest in the rates of commission to be paid their agents, whether located in Canada or the United States—an interest reflected in ASTA's own organizational setup, whose membership includes Canadian travel agents and whose presidents and directors are elected from Canada as well as the United States (Ex. 135, R. 398).

The foreign policy implications of the international trade involved were of much concern to our Department of State when Congress undertook to amend the Shipping Act in 1961 by enacting the so-called "Dual Rate Law" (P. L. 87-346, 75 Stat. 762). The House Committee considering the amending legislation had included provisions to which the State Department objected on foreign policy grounds, even though the committee had recognized that

> "The foreign commerce of the United States is also the foreign commerce of another nation. No government completely controls more than one end of the journey and only a fraction of the carriers are its own nationals."[8]

[8] See H. Rep. No. 498, 87th Cong., 1st Sess., p. 2 (1961).

The State Department cautioned that

> "• • • it would appear most important to our foreign policy that the U.S. Government consider carefully any future action in the general field of governmental regulation of shipping engaged in the foreign commerce of the United States, and that no further departures from the international pattern should be made unless a clear and conclusive necessity therefor is demonstrated." [9]

Heeding that advice, the Senate committee deleted proposed amendments to the Shipping Act attempting to extend the jurisdiction of the Commission over foreign nationals and foreign records and giving the Commission power to pass upon the reasonableness of rates.[10]

***The Purpose Served by Conferences***

Steamship conferences came into existence to preserve, among other advantages, regularity and frequency of service, stability and uniformity of rates, economy in the cost of service, better distribution of sailings, and equal treatment of the public through the elimination of secret arrangements and underhanded methods of discrimination.[11] Conferences have been defined as "voluntary associations of ocean common carriers formed so that the members may agree upon rates and certain other competitive practices." [12] One of their purposes is the reduc-

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[9] See H. Rep. No. 498, 87th Cong., 1st Sess., p. 29 (1961).

[10] S. Rep. No. 860, 87th Cong., 1st Sess., pp. 24-25 (1961).

[11] Alexander Report, p. 416; see also H. Rep. No. 498, 87th Cong., 1st Sess., p. 4 (1961).

[12] S. Rep. No. 860, 87th Cong., 1st Sess., p. 4 (1961).

tion of "the rigors of competition which otherwise would exist among the member lines." [13] Recognizing the need of our foreign trade for effective and stable shipping conferences, Section 15 of the Shipping Act, 1916, expressly *excepts* approved conference agreements from the operation of the antitrust laws. 39 Stat. 733, 46 U. S. C. §814.

The "necessary evil" characterization of conferences applied here by the regulatory agency charged with supervising them (C. Br. 14) hardly seems consistent with its recommendation to the Congress when the 1961 amendments to the Shipping Act were under consideration. Then it said:

> "The Board believes that conferences are needed if stability in rates and services is to be maintained in the foreign trade. We further believe that if the conferences are to be continued they must have the power to assure themselves of the loyalty of merchants upon whose trade they depend." [14]

The Commission acknowledges here that the Shipping Act, 1916, was enacted "to accommodate the unique needs

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[13] S. Rep. No. 860, 87th Cong., 1st Sess., p. 4 (1961). As the Senate Report pointed out (p. 4):

> "For many years all of the maritime nations of the world, including the United States, have realized that the inevitable monopolistic and discriminatory nature of rate-war competition among the ocean common carriers serving their foreign commerce, justified the formation of conferences so that the carriers may limit or regulate competition between or among themselves."

[14] H. Rep. No. 498, 87th Cong., 1st Sess., p. 15 (1961). The Commission was, of course, then speaking of the dual rate system, the legalizing of which it favored as "the only workable method of achieving such purpose [*i.e.*, stability of rates and services] and which is not at the same time contrary to the American concept of fairness * * *." *Ibid.*

of the shipping industry" for workable conference arrangements to the demands of our antitrust laws (C. Br. 11). The Congressional reports accompanying the 1961 legislation amending the Act re-emphasized that ordinary antitrust rules cannot be fully applied in international shipping matters. Thus the Senate committee report, quoting the House report, noted

> "The Department of Justice testimony on the legislation was generally unfavorable. While its position is consistent with the antitrust policy of the United States, it fails to take into account the peculiar nature of the particular business involved * * *.
>
> * * * * *
>
> "The hearings of the committee have made it quite clear that our traditional antitrust concepts cannot be fully applied to this aspect of international commerce. Your committee has concluded that any attempt to effect regulation of this commerce in a measure comparable to that applied to our domestic commerce would be highly detrimental to our essential American-flag merchant marine." [15]

***The Conference Agreements Involved Here***

Two conference agreements are involved here: No. 120 constituting TAPC in 1929 (Ex. 1, R. 160) and No. 7840 reconstituting APC in 1946 (Ex. 2, R. 204).[16] The agreements were filed with the Commission at the time of their adoption in compliance with Section 15 of the Shipping Act and received continuous Commission approval in all respects until the Commission rendered its first opinion

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[15] S. Rep. No. 860, 87th Cong., 1st Sess., p. 2 (1961).

[16] APC dates back to 1921 but was terminated during World War II, (R. 33, 139; Ex. 119, R. 388).

and order herein in January, 1964 (R. 403, 451, 454-455, 502-503).[17] Each agreement expressly provided for accurate recording and filing with the Commission of copies of minutes of conference meetings and conference minutes were filed as required by such agreements and as required by the Commission's regulations (Ex. 1, R. 162; Ex. 2, R. 217). Not until the Examiner rendered his initial decision herein in January, 1963 had the Commission indicated any dissatisfaction concerning the adequacy of minutes filed (R. 402, 423).

Pursuant to Agreement 7840 (Ex. 2, R. 204), APC establishes, *inter alia,* uniform business policies among the member lines regarding passenger fares and rates of commission payable to agents (R. 416)—important economic matters which mutually concern and apply to members on both sides of the Atlantic. The APC agreement, like every predecessor conference agreement back to at least 1879 (Ex. 119, R. 388), is founded upon the principle that conference action shall be taken by unanimous agreement of the member lines (Ex. 2, R. 210).

The fundamental requirement of unanimity is specifically made applicable to the rates of commission payable to conference agents in the following terms (Ex. 2, R. 212):

> "(a) Rates of Commission and Handling Fees which Member Lines may pay to their General Agents or Sub-Agents[18] shall be established by unanimous agreement of the Member Lines."

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[17] As of 1960 the agreement numbers on the most recent modifications ("7840-40" and "120-76") indicate that the APC agreement had been before the Commission 40 times and the TAPC agreement 76 times for approval of various modifications adopted over the years (Ex. 1, R. 155; Ex. 2, R. 188).

[18] "Sub-agents" is a traditional term for conference selected and approved travel agents appointed by conference member lines (R. 410).

This is the long-approved "unanimity rule" which the Commission has now disapproved as violating Section 15 of the Shipping Act (R. 475-478, 587). It was this procedure which established the current rates of commission paid to agents, as to which the Commission found (R. 481-482):

> "* * * that the record in this proceeding does not support a finding that the level of commissions is unreasonably low."

And

> "* * * on this record there is not a sufficient showing for us to declare that such levels are detrimental to the commerce of the United States or otherwise unlawful under section 15."

TAPC Agreement 120 expressly states its purpose to be "to coordinate action, harmonise policies, and regulate all matters, other than the fixation of rates and commission, relating to the operation and enforcement in the United States and Canada of the ATLANTIC PASSENGER STEAMSHIP CONFERENCE (Folkestone, England) Agreement and the rules and regulations adopted thereunder, * * *" (Ex. 1, R. 160-161; R. 415).

Agreement 120 contains, *inter alia,* basic provisions and rules relating to the selection and supervision of agents in the United States and Canada for the sale of transportation on this side of the Atlantic and the obligations of the member lines to such agents (Ex. 1, R. 169; R. 415). It provides, for example, that the member lines' sale of transportation through agents shall be confined to their respective appointed agents (Ex. 1, R. 169); that such agents shall be appointed pursuant to a uniform agency appointment agreement (Ex. 1, R. 172); and that the relationship

between the lines and agents shall be governed by uniform rules (Ex. 1, R. 172). Both the uniform agency appointment agreement and rules are incorporated in Agreement 120 as approved by the Commission (Ex. 1, R. 172-174, 174-180).

As the Alexander Report pointed out,[19] passenger steamship conferences were traditionally founded upon two principles, (1) unanimous voting, already referred to; and (2) prohibition of conference agents representing non-conference competitive services. The TAPC agreement, like its predecessors, embodied a prohibition against appointed agents representing non-conference lines in the following terms (Ex. 1, R. 171; R. 418):

> "(e) *Sub-agencies Selling Tickets for Non-Member Lines*—A sub-agency shall be prohibited from selling passage tickets for any steamer not connected with the fleets of the member Lines for which it has been duly appointed or from representing in any capacity any steamship company operating such a steamer, if such steamer, is operating in any competitive trans-Atlantic trade (unless written permission to do so is first obtained from the member Lines), or acting or representing itself as agency for, or as entitled to do business with, any member Line it does not represent by regular appointment. This rule shall not prevent any sub-agent from booking for any United States Government Line."

This is the long-approved fundamental "tieing rule" (Ex. 3, R. 227), now disapproved by the Commission as violating

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[19] Alexander Report, p. 43.

the Shipping Act (R. 484-485, 587).[20] Aside from the total absence of evidence to support such a conclusion (*infra*, p. 31), the Commission ignored the provisions in these agreements under which any transatlantic water carrier, including freighter ships offering limited passenger capacity, may easily become a conference member and thus have ready access to the corps of conference agents (Ex. 1, R. 164, 167; Ex. 2, R. 206, 207).[21]

***Conference Relationships with Travel Agents***

As the Alexander Report recognized in 1914, passenger steamship lines "regard the control of agency forces a primary object" of conference agreements and the agents themselves favor such control.[22] There are sound economic

[20] The tieing rule is also included in the "Rules" forming part of the uniform sub-agency appointment agreement which agents enter into upon appointment by member lines, and which was filed with and approved by the Commission as part of Agreement 120 (Ex. 1, R. 172, 175).

[21] Passenger water carriers offering or intending to offer regular transatlantic service are eligible for full voting membership (Ex. 1, R. 164; Ex. 2, R. 206). Freighter shipping lines whose normal passenger capacity is not more than twelve per vessel are eligible for associate membership (Ex. 1, R. 167; Ex. 2, R. 207). Associate members, as regular members, may utilize all conference agents. Membership may not be denied eligible applicants except "for just and reasonable cause" and any denial of membership must be reported to the Commission (Ex. 1, R. 164, 167; Ex. 2, R. 206, 207).

In 1961 TAPC had nine associate members (Ex. 111, R. 382). Member lines of both conferences also operate freighter ships upon which transatlantic passage is available for sale by appointed agents at regular commission to people who desire to travel in that manner (R. 589).

[22] Alexander Report, p. 43. Even ASTA, through a main spokesman at the hearing, recognized "that the conference is the only modus operandi to run a respectable business. The carriers and the principals [top officers of the lines, who meet together and make the high level policy decisions of the conference] must have some

(*continued on following page*)

reasons for this. *First,* the conference lines are required to furnish regular, dependable passenger service to the public (Ex. 1, R. 159, 164; Ex. 2, R. 204, 206). If the public interest in such service all year round is to be maintained, and the passenger lines are to have the requisite financial ability to furnish it, they must be able to fill their ships with as many passengers as possible in all seasons.[23] The lines rely upon their appointed agents as their principal sales force to produce the passengers and make it possible for the lines to perform regular service to the public (R. 448).[24] Just as freight conferences "must have the power to assure themselves of the loyalty of merchants upon whom they depend"—as the Commission has recognized (*supra,* p. 6)—the passenger conference lines must also have the means to insure the contractual loyalty of their agents upon whom they depend. This is one purpose of the tieing rule, the other having to do with preserving the stability of the conference itself (*infra,* p. 33).

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control over their salesmen and their agents" (R. 434-435). See also the recommendation of the International Consultative Council of Travel Agents (I. C. C. T. A.) (Ex. 50, R. 291, 293-294).

[23] Because of seasonal weather conditions affecting the desirability of transatlantic travel, conference fares and rates of commission had in the past been geared to "high season" and "off season" (R. 68, 118; Ex. 59, R. 334, 337; Ex. 66, R. 347). "High season" is the spring-summer period when ocean travel is pleasurable and respondents have little difficulty filling their ships (R. 105; Ex. 111, R. 380). "Off season" is the fall-winter period when space is plentiful and passenger fares have traditionally been reduced and agents' commission rates sometimes increased in order to attract travelers by sea even though vessel operating expense is not appreciably different than in the high season (R. 105, 107, 118; Ex. 28, R. 251; Ex. 50, R. 276; Ex. 67, R. 351-352; Ex. 96, R. 374(3)).

[24] Appointed agents accounted for 75 to 80 per cent of transatlantic bookings sold annually in the United States by TAPC member lines in the 1955-1960 period (Exs. 96, 98; R. 371, 375).

*Second,* the conference lines also bind themselves to deal exclusively with and pay commissions only to their appointed agents (Ex. 1, R. 169). The agents are not mere independent ticket brokers; their relationship to the conference lines "is of a fiduciary nature, as large sums of money are handled by" them.[25] Through conference screening procedures the member lines endeavor to secure the appointment of competent and trustworthy travel agents—agents on whom the traveling public can rely and agents who can produce business in sufficient volume to warrant the expense to the lines of maintaining the conference system of agency supervision and assistance.[26]

In addition to the commissions paid them, appointed agents receive other benefits from the member lines. They and their wives and children travel on member line vessels at a 75 per cent fare reduction. This also applies to the agents' responsible steamship clerks and their families (Ex. 3, R. 224). Agents or their employees obtain free passage when serving as party organizers or tour conductors (Ex. 3, R. 225). For a relatively nominal annual fee[27] appointed agents receive various services from TAPC, including bond-

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[25] *Singer* v. *Trans-Atlantic Passenger Conference,* 1 U. S. S. B. B. 520, 523 (1936).

[26] The Commission has in the past refused to weaken the tie between the TAPC lines and their appointed agents. In *Singer* v. *Trans-Atlantic Passenger Conference, supra,* the Commission upheld the member lines' right not to appoint all ticket sellers as their agents and to refuse payment of commissions to non-appointed ticket sellers licensed by the State of New York who had booked passengers on member line ships (1 U. S. S. B. B. at 523).

[27] Ranging from $15 for agents located in smaller towns up to $40 for those located in New York City (Ex. 3, R. 228-229). Contrary to the Commission's assertions (R. 564; C. Br. 21) these amounts do not cover the direct expense (exclusive of overhead) of each member line of maintaining agents, which was estimated to be $100 per agent per year (R. 56).

ing, informative bulletins on applicable laws, regulations, passport and visa requirements, etc. (Ex. 3, R. 230; R. 56-57; Ex. 111, R. 380-382), and assistance from a conference auditor in setting up efficient record-keeping systems (R. 58).

*Third,* the conference lines' own economic interest dictates that the agents who produce 75 to 80 per cent of the transatlantic bookings be reasonably compensated, if the lines are to continue to get their business (R. 71-72). The records of APC introduced into evidence show beyond dispute that the question of the proper level of such compensation was considered at least once, and often more frequently, in virtually every year covered by the Commission's investigation.[28]

Indeed, a procedure was established to insure that views of travel agents on both sides of the Atlantic on this and other matters of mutual interest would be regularly and formally brought to the attention of APC. Representatives of a group known as the International Consultative Council of Travel Agents (I.C.C.T.A.), representing travel agent associations from the various countries served by APC lines, met with APC Principals at a General Meeting

[28] See Ex. 50: March 1950 (R. 273-274), October 1950 (R. 276), October 1951 (R. 281-282), February 1952 (R. 382-383), August 1953 (R. 283-284), September 1955 (R. 293-299), September 1956 (R. 303-307); Ex. 54: Minutes of Meeting of March 1951 (R. 316-321); Ex. 59: March, June 1952 (R. 322-338); Ex. 66: Minutes of Meeting of May 1956 (R. 344-347); Ex. 67: September 1957 (R. 348-354); Ex. 68: February 1958 (R. 355-362); Ex. 23: October 1958 (R. 249); Ex. 22: February 1959 (R. 246-248); Ex. 28: Minutes of Meeting of May 1960 (R. 250-253); Ex. 60: Minutes of Meetings of March 5, 1963 and June 1953 (R. 339-341); Ex. 62: Minutes of Meeting of October 1953 (R. 342); Ex. 64: March 1955 (R. 343); Ex. 96 (R. 374(1)-374(8)), Ex. 29 (R. 254-270).

in 1953 (R. 65-68; Ex. 50, R. 283-284). Thereafter, an I.C.C.T.A. delegation met with an APC committee just prior to the Principals' General Meeting held in October 1955, and again in 1956 and 1957 (Ex. 50, R. 291-299, 300-307; Ex. 67, R. 348-354). Beginning in 1958 ASTA refused to participate in I.C.C.T.A. meetings, delivering instead an ultimatum that it "can no longer accept the continuation of the unanimity rule * * *" (R. 50; Ex. 50, R. 299-300).

Far from any "freeze" (A. Br. 4), the commission rate has in fact been increased a number of times by APC operating pursuant to the unanimity rule. Before World War II, the commission rate for transatlantic bookings was 5 per cent (R. 128); in October 1946 it was raised to 6 per cent for all crossings; in March 1951 to 7½ per cent for off-season (fall-winter) crossings; and in March 1956 to 7 per cent, all classes, all seasons (R. 118).[29] In 1960 APC provided for the retroactive payment of commissions for bookings sold by travel agents during the year prior to their appointment as agents of member lines (R. 5-7, 9), and in 1961 provision was made for additional allowances to agents for the cost of tour advertising folders (Ex.

[29] The March 1956 increase alone was estimated by ASTA to represent $1,000,000 a year in additional commission revenues to agents (Ex. 135, R. 398). And it has, despite a simultaneous increase in passenger fares (Ex. 29, R. 258) (increasing the base to which the increased commission rate is applied), absorbed approximately 30 per cent of the average annual revenue increase of the lines from passenger bookings sold in the United States since the commission increase ($3,348,700) (Ex. 98, R. 375).

It should also be noted that since 1955 agents have increased the amount of bookings sold on the lines' vessels (Ex. 98, R. 375) and derived from such bookings approximately the same proportion of their total income as such bookings bear to total bookings from air, sea and other travel (Ex. 106, R. 379); and that more and more travel agents in the United States and Canada have been applying to the lines for appointment (Ex. 29, R. 260), some 1,100 having been added between 1950 and 1960 (Ex. 117, R. 387).

100, R. 376). In 1962, the lines also unanimously agreed to pay a 10 per cent commission on the ocean portion of tours (R. 425, 431, 468-469).

Although ASTA urged the Commission to find such commissions "unremunerative, noncompensatory, or a burden on ASTA's other services" (R. 481),[30] the Commission refused, agreeing with the Examiner that the record "does not support a finding that the level of commissions is unreasonably low" (R. 481).[31]

***Proceedings Before the Commission***

The Commission's order of investigation published in the Federal Register invited "all interested persons to intervene and participate herein" (R. 2). Aside from ASTA, only two non-appointed travel agencies intervened, and only one of these (McManus) actually appeared (R. i, items 3, 4 and 6; R. 8, 26, 588-589). No non-conference carrier or anyone representing such carriers or any segment of the traveling public participated in the proceedings and no evidence was produced as to the effect of conference agreements or practices upon such persons.

Upon the entire record of the investigation the Examiner's ultimate conclusion was (R. 449):

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[30] ASTA, of course, is but a trade association of travel agents, which represents about 1,400 travel agents in the United States and Canada (R. 414), approximately 90% of whom hold appointment from one or more TAPC lines (ASTA Application to Intervene, par. I [R. i, item 5]).

[31] Referring to ASTA's proffered Exhibit 106 (R. 379), the Commission commented that it "merely shows the rapid expansion of the airlines. It does not show that the agents are being forced out of business or losing money through the sale of sea bookings" (R. 482). This is reinforced by the data mentioned in footnote 29 on p. 15, *supra*.

> "Insofar as they relate to travel agents, Agreement No. 7840 of APC and Agreement No. 120 of TAPC are not found, in principle, to be unjustly discriminatory or unfair as between the parties named in section 15 of the Act, to operate to the detriment of the commerce of the United States, to be contrary to the public interest, nor to be in violation of the Shipping Act, 1916, provided they are modified in accordance with this decision. The agreements therefore should not be disapproved or cancelled insofar as they relate to travel agents." [32]

The Examiner recommended disapproval of the tieing rule not because of evidence showing violation of any Section 15 standard but solely on the ground that it was not shown to be "necessary in order to promote stability in rates or to combat destructive competition" (R. 441).[33] However, he recommended approval of the unanimity rule (R. 442).

Despite "a searching review of the conference records" conducted by petitioners (R. 403), the Examiner concluded

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[32] The recommended modifications related to TAPC practices and procedures for the selection, appointment and supervision of agents. All were accepted by respondents, except abolition of the tieing rule and disenfranchisement of member lines serving Canadian ports from voting on changes in agents' commissions (R. 471-474). A thorough-going revision updating the TAPC provisions and regulations regarding travel agents was filed with the Commission as directed (R. 450).

[33] The Examiner, however, recognized that if such agents' services were made freely available to non-conference carriers, "lines who are presently members of the conference might choose to become independent by relinquishing their membership" (R. 419). He failed to recognize the clear intent of Congress that arrangements designed to effectuate conference stability were not to be disapproved on the basis of our traditional antitrust concepts (*supra*, p. 7).

there was no proof in the record supporting their contentions that the unanimity rule (a) had blocked or delayed conference action to increase commissions payable to agents, (b) had placed the member lines at a competitive disadvantage relative to the airlines, and (c) should be disapproved as detrimental to the commerce of the United States (R. 441-444). Furthermore, although the Examiner excluded lines not engaging "in the foreign commerce of the United States" from voting on commissions to be paid agents here (R. 444), he did not find that such member lines had blocked, delayed or vetoed conference action to increase agents' commissions, and could not have done so on this record.[34] His recommended disenfranchisement of lines which he mistakenly thought had no direct interest in commissions payable for transportation to and from the United States constituted in no sense a "qualified" or limited acceptance of the unanimity rule, as petitioners suggest (C. Br. 6-7; A. Br. 8, 10, fn. 10). The Examiner clearly approved the unanimity rule as to all lines he thought had a real interest in the trade involved.

In explaining the democratic purpose of the rule as applied to *all* member lines (cf. C. Br. 16), he pointed out (R. 442):

> "It is not difficult to understand why the individual lines would desire to retain a considerable amount of

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[34] Both petitioners misread the evidence in stating that seven member lines do not serve United States ports (C. Br. 6; A. Br. 8). R. 120 contains no such proof and R. 620-625 (A. Br. 8), contrary to ASTA's footnote, shows that Portuguese Line, Incres Line and Oranje Line (connected with Holland-America Line) served United States ports (R. 621, 623, 624). Of the four remaining lines serving only Canadian ports, at least one, Canadian Pacific Steamships, sells a substantial number of bookings through agents here (R. 620; Ex. 96, R. 373).

> autonomy (or veto power) over the question of commissions when they enter into a conference agreement with other lines. If only a simple majority of the member lines were required to increase or decrease the rate of commission, the will of the conference would be imposed upon that of many of the individual member lines quite frequently on this vital question." [35]

The Examiner stressed the protection afforded by the unanimity rule to American-flag carriers (R. 423):

> "The executives of the American-flag steamship lines which are members of APC, and who testified at the hearing, stated that in view of the small minority of American-flag lines in the conference, the unanimity rule was of substantial value to the American-flag lines. They stated that the rules were necessary to protect the interests of the American operators and, without exceptions, they favored the rule. Respondents assert that the advantages of unanimity is to prevent travel agents from playing one line against another. They state that when all lines participate in the selection of rates of commission, no line is in a position to say that it is favoring agents more than another."

Having noted the continuous adherence to the unanimity rule since 1879 (R. 423), the Examiner concluded (R. 442-443):

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[35] The Examiner apparently overlooked the historic unity of the United States-Canadian side of the Atlantic passenger trade and the unrebutted evidence that lines he would disenfranchise in fact had appointed agents or general agents in the United States as well as Canada through whom bookings here were sold (Ex. 96, R. 372-374; *supra*, pp. 3-4).

> "If, in their business judgment, the lines all feel the need for the protection afforded them by the Unanimity Rule, this judgment should not be disturbed by the Commission unless it results in a clear violation of section 15 • • • "

Respondents excepted to the Examiner's recommended disapproval of the tieing rule and exclusion of lines serving Canadian ports from voting on rates of commission to agents in the United States (if that was what he intended) (R. 484, 486).[36] ASTA and Commission hearing counsel, on the other hand, excepted to the Examiner's recommended approval of the unanimity rule and ASTA urged again that the 7 per cent commission rate be declared unlawful (R. 408, 475, 480).

In passing upon the exceptions, and with two Commissioners dissenting in each instance, the Commission agreed with the Examiner's disapproval of the TAPC tieing rule (R. 484) and disagreed with his recommendation on the APC unanimity rule (R. 475). The Commission held that

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[36] Contrary to ASTA's contention (A. Br. 9), respondents' exceptions did not acquiesce in the Examiner's legal "standards" but contested vigorously his application of strict antitrust principles in construing the Shipping Act (R. 484).

Equally misleading is ASTA's related assertion that respondents "now operate with a three-fourths voting rule" in the TAPC conference. As the Commission acknowledges (C. Br. 7), the TAPC unanimity provision referred to had nothing to do with commissions or any similarity or relationship to the APC unanimity rule here involved. The TAPC rule applies only to action of the TAPC committee on control of sub-agencies in approving travel agency applicants for the eligible list, passing upon requests of appointed agents to sell their agencies and like matters. No change has been ordered in the provision of TAPC Agreement 120 that control committee representatives shall be selected by unanimous vote of the member lines or in any of the other unanimous voting provisions of that agreement.

the unanimity rule "operates to the detriment of the commerce of the United States" (R. 478). This conclusion was placed on two stated grounds:

> (1) "It is a regulation which prevents travel agents in the United States from rendering complete and effective service both to passengers and to ocean carriers."

and

> (2) "It has in some cases prevented the principals from even considering the question of commission levels and in others has defeated, or at least delayed or watered down the desires of the majority of the lines to raise commission levels, thus placing the steamship lines at a competitive disadvantage *vis-a-vis* the airlines" (R. 478).

These reasons are in sharp conflict with the Commission's findings, noted *supra*, p. 16, that there was no evidence that conference commission levels established under the rule were unreasonably low, or that such levels were unremunerative or a burden on agents, or detrimental to commerce or otherwise unlawful under Section 15 (R. 480, 482) and with its finding that (R. 481)

> "The record does show a decrease in the relative number of steamship bookings in relation to total bookings. But it is not established that the level of commissions is the primary reason for this. The problem of diversion of passengers from sea to air does exist, and it is a problem which the lines have attempted to solve by increasing the commission level. But it is undisputed that the enormous growth in air travel is largely attributable to factors unrelated to

the steamship passenger industry, such as the increased seating capacity and speed provided by the new jet aircraft, and the introduction of many new foreign air carriers serving the United States." [37]

Contrary to the Commission's implication in its brief here (C. Br. 8), no "extensive findings" were made in the majority report on remand. Following the remand, the Commission received no new evidence to support its findings. It simply held an oral argument and directed the parties to file briefs "with any fact relied on by either party to be specifically identified by reference to the place in the record where found" (R. 530). No new facts were referred to, or claimed to have been previously overlooked in the existing record, as support for its disapproval of the tieing and unanimity rules (R. 531-567, 587).[38]

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[37] It is this "enormous growth in air travel," rather than a decline in sea travel, which accounts for the "decrease in the relative number of steamship bookings." The lines have maintained a fairly constant total of passenger carryings consistent with their capacity limitations (R. 138; Ex. 138, R. 401). It is indeed "not established that the level of commissions is the primary reason for this" relative decrease. As the New York Area Director of ASTA, a travel agency owner, testified: "I never expect that even if the steamship commission will be 15 or 20 per cent, that we can change the trend" (Ex. 90, R. 368).

[38] As Vice-Chairman Patterson stated in his dissent (R. 570):

"There is just as much lack of evidence now as when we made the decision in the same Docket No. 873, reported in 7 FMC 737 (1964). There is still no proof in the form of evidence summarized in findings that the agreements may be found:

"(a) to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors;

"(b) to operate to the detriment of the commerce of the United States;

"(c) to be contrary to the public interest; or

"(d) to be in violation of the Act."

*(continued on following page)*

As before, the Commission's disapproval of the rules rested upon unproved assumptions unsupported by evidence showing any relationship between those assumptions and the criteria set forth in Section 15 of the Act. The minority had pointed this out even before the remand (R. 493).[39]

***The Judgments Below***

The first opinion and judgment herein was entered June 10, 1965 (R. 517; 122 U. S. App. D. C. 59, 351 F. 2d 756; see App. A hereto). On respondents' petition for review (R. 504) the court remanded the case to the Commission for reconsideration "and with directions for further proceedings consistent with the opinion of this court" (App. A, p. 2a). Although the court's opinion dealt with all matters of law and fact now complained of by petitioners, no review of that judgment was sought (C. Br. 8).

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Even the suggestion that on "one occasion" a single line had "blocked an increase in the maximum commission rate" (C. Br. 8, fn. 5) is contrary to the record. The cited reference (R. 374(2)) shows only "strong objection to an immediate adjustment to 7%" by a line whose Principal was a party to the "aide memoire" dated March 1, 1956 (R. 374(3), 374(8)) which resulted in the increase to 7 per cent adopted May 7, 1956 (R. 346-347), and whose objection sought an alternative rate of 8 per cent "during the off season * * * with the idea of encouraging the booking of more [off-season] business" (R. 374(3)).

[39] The minority opinion by Vice-Chairman Patterson observed (R. 493-494):

> "The effect of the obligation [Unanimity Rule] on the public and on our commerce is the relevant test. The majority seems to assume without the need to prove that if it can show the obligation allows 'one single vote' to 'block a proposal on commission matters even though the proposal was favored by an overwhelming majority of the member lines,' then it has automatically shown public injury. This does not follow at all. Some connection between cause and effect has to be shown.

After discussing the inadequacy of the facts cited by the Commission as reason for disapproving the two rules in question, the court instructed the Commission concerning its statutory duty to find *"as a fact* that the agreement operates in one of the four ways set out in the section by Congress" [emphasis supplied], referring to Section 15 of the Shipping Act, 1916. The court further pointed out that the Commission must also consider antitrust principles in determining whether Shipping Act standards have been met, citing its own decision in *Isbrandtsen Co.* v. *United States,* 93 U. S. App. D. C. 293, 299, 211 F. 2d 51, 57, *cert. denied sub nom. Japan-Atlantic & Gulf Conference* v. *United States,* 347 U. S. 990 (1954) (R. 527).

The Commission's report and order on remand, served on July 20, 1966 (R. 531-587), was reversed by the Court of Appeals on respondents' petition for review (R. 642, 655; 125 U. S. App. D. C. 359, 372 F. 2d 932). The court saw no purpose in further remand since (R. 654; 372 F. 2d at 934)

> "Careful analysis of the record, however, convinces us that nothing substantial has been added to support, sustain, or even justify the Commission's condemnation and voiding of the Conference actions. As the two dissenting opinions of Commission members accurately point out, the Commission Report lacks sufficient basis in supporting facts or evidence of record and consists only of rationalizations, conjecture and opinion."

This absence of substantial evidence pointed out by the court, and now demonstrated, renders all the more inexplicable the complete reversal of long-standing Commission policy without compelling reason therefor, which the Commission's order in this case represents.

## Summary of Argument

### I

The Commission's disapproval of the long-approved TAPC tieing rule was not based on substantial evidence of violation of any of the prescribed standards in Section 15 of the Shipping Act. The record contains not even a scintilla of evidence that the tieing rule operated to produce any unfairness, unjust discrimination or injury to non-conference carriers, loss to conference agents, harm to the traveling public or detriment to the commerce of the United States.

The only non-conference carriers affected by the tieing rule are those engaged primarily in the carriage of cargo, not passengers, but even these may become, as many have, associate members of the conference and thus make use of conference agents. The tieing rule is not designed to combat steamship competition in the Atlantic passenger trade but to strengthen the contractual allegiance between the member lines and their appointed agents upon whom they depend as their principal sales force. The conference system of agency selection and supervision is also one of the chief inducements TAPC can offer to hold its present members. Abolition of the tieing rule would impair the stability of TAPC and defeat the clear intent of Congress to encourage such conferences.

Agency action may be set aside if unsupported by substantial evidence; *i.e.*, "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion". *Consolo* v. *Federal Maritime Commission*, 383 U. S. 607, 619 (1966). The Court of Appeals correctly remanded the Commission's order with directions to ap-

prove the agreement unless it could make adequately supported findings showing that the tieing rule violated one of the prescribed Shipping Act standards. The Court of Appeals properly reversed the Commission's order issued after remand when it was found unsupported by substantial evidence in the record as a whole and based upon rationalizations, conjecture and opinion, and when the Commission had invalidated the rule on the ground it was counter to antitrust principles.

## II

The Commission's reasons for disapproving the long-approved APC unanimity rule, pursuant to which agents' commission rates are established, are without a basis in substantial evidence and are in fact contrary to the record and the Commission's own findings. The Commission overruled its Examiner's recommendation that approval of the rule be continued. Yet the Commission agreed that the record would not support a finding that agents' commission levels were unreasonably low, non-compensatory to agents, detrimental to commerce or otherwise in violation of the Act. The Commission also found the record did not establish that the level of commissions to agents was responsible for the relative decline in sea travel versus air travel. This, the Commission attributed "to factors unrelated to the steamship passenger industry", such as the expansion and improvement of transatlantic air transportation.

The Commission declared the unanimity rule detrimental to commerce on two grounds, (1) it prevented travel agents from rendering complete and effective service to the carriers and the public, and (2) it placed the conference lines at a competitive disadvantage vis-à-vis the airlines. The

first ground is refuted by the Commission's finding that the record discloses no evidence that conference agents persuaded any specific traveler to use air travel in preference to sea travel against the traveler's desires or to his disadvantage.

The second ground of disapproval was predicated on assumptions that the unanimity rule had prevented conference consideration of, and had blocked or delayed increases in agents' commission rates desired by a majority of lines, a ground the Examiner had rejected because mere conjecture would be required to find what commission rate would have been established under some other voting rule. The Commission's purported "evidence" of conference inaction and delay is contrary to the evidence in the record, which shows continual consideration and action regarding agents' commission levels by member lines over the years and full parity of steamship and airline commission rates before this proceeding was decided. The Commission's order reflects not only a misunderstanding of the workings of the conference but also of the important economic reasons why no member line—and especially the American-flag minority—wishes to surrender control over basic financial decisions to the will of a majority of competitors.

The Court of Appeals correctly remanded the Commission's order in the first instance and properly reversed it when the Commission issued its order after remand with the same lack of substantial evidence and on the same rationalizations, conjecture and opinion as had prompted the remand.

## III

The Court of Appeals correctly instructed the Commission that the conference rules can be disapproved under Section 15 of the Shipping Act, 1916, only on the basis of adequately supported findings of fact that the agreements violated one of the four standards specified by Congress in that section. This Court has recognized that the language of Section 15 was deliberately selected by Congress to indicate how the need for concerted activities in the shipping industry and the antitrust laws were to be accommodated. *Carnation Co.* v. *Pacific Westbound Conference,* 383 U. S. 213 (1966).

The Commission, in disagreement with this principle, the Court of Appeals and congressional intent, has nevertheless disapproved the conference rules as *per se* unlawful under antitrust principles, contending that respondents showed no justification for them. Congress, however, has already found compelling justification for the approval of conference agreements, otherwise unlawful under our antitrust laws, by enacting Section 15 of the Shipping Act. It has not placed the burden of affirmatively showing justification for such agreements upon those seeking approval but has commanded the Commission to approve all such agreements unless found to operate in violation of the prescribed standards.

The 1961 amendments to the Shipping Act which added "contrary to the public interest" to the Section 15 standards did not empower the Commission to test the validity of conference agreements by the application of strict antitrust principles, as was done here. Congress in enacting those amendments reaffirmed that "our traditional antitrust concepts cannot be fully applied to this aspect of

international commerce." The Commission itself recommended that it not be required, as initially proposed under the 1961 amendments, to affirmatively find that agreements were in the public interest before approving them and Congress adopted that recommendation.

This Court has on many occasions held that where, as here, Congress has selected specific standards by which agreements otherwise in violation of the antitrust laws may be exempted from those laws, those standards must be applied, not antitrust standards. *Minneapolis & St. Louis Railroad Co.* v. *United States,* 361 U. S. 173 (1959); *Seaboard Air Line Railroad Co.* v. *United States,* 382 U. S. 154 (1965).

The Court of Appeals properly remanded the Commission's order for failure to apply the standards prescribed by Section 15 of the Shipping Act and then properly reversed it when, in lieu of substantial evidence of violation of those standards, the Commission again disapproved the conference rules on antitrust ground.

## IV

The Examiner found that ASTA's independent ground, urged here as a basis for affirmance of the Commission's order, was not substantiated in the record. Neither the Commission nor the Court of Appeals considered it. The order not having been based on that ground, and the ground clearly involving determinations of fact which could only be made by the administrative agency, it cannot be made the basis for decision here. *Burlington Truck Lines, Inc.* v. *United States,* 371 U. S. 156, 168-169 (1962).

## ARGUMENT

### I.

**The Commission's disapproval of the tieing rule was properly set aside as unsupported by substantial evidence of violation of Shipping Act standards.**

Section 15 of the Shipping Act, 1916, imposes an affirmative duty upon the Commission to approve agreements between water carriers unless it finds them "unjustly discriminatory or unfair as between carriers * * *, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this chapter. * * *" (39 Stat. 733, 46 U. S. C. §814, as amended 75 Stat. 763). When this proceeding was first before the Court of Appeals in 1965, the Court was "unable to find any ultimate factual conclusion within those specified in that section which would support" disapproval of the tieing rule (R. 525; 351 F. 2d at 760). Accordingly the court remanded

> "with directions that either an *adequately supported* ultimate finding be made which warrants disapproval under the statute, or if no such finding can be made on the record, that the tieing rule be approved as directed by 46 U. S. C. §814." (R. 528; 351 F. 2d at 762; emphasis supplied.)

On the second review after remand a new panel of the Court of Appeals (except for Judge Danaher) unanimously found that there had still been no showing that the Commission's conclusion that the tieing rule should be disapproved was supported by substantial evidence. As the Court accurately pointed out:

> "The case now returns to us upon the same evidentiary record which was before us when we previously

reviewed the proceedings. True it is that the Commission's present opinion enlarges upon its previously stated views and is couched at various points in the phraseology of the statute. Careful analysis of the record, however, convinces us that nothing substantial has been added to support, sustain, or even justify the Commission's condemnation and voiding of the Conference actions. As the two dissenting opinions of Commission members accurately point out, the Commission Report lacks sufficient basis in supporting facts or evidence of record and consists only of rationalizations, conjecture and opinion" (R. 654; 372 F. 2d at 933-934).

Disapproval of the tieing rule was not based upon evidence of violation of Shipping Act standards because there was no such evidence. No non-conference carrier (or spokesman) appeared as complainant, intervenor or witness although the proceedings were widely publicized, and no evidence was produced of any unfairness, unjust discrimination against or injury to such carriers by reason of the rule. Nor was there any evidence that the rule operated to cause any measurable loss to conference agents, harm to the traveling public or detriment to the commerce of the United States.[40] The Commission's Examiner found

[40] The total evidence on the tieing rule consists of the testimony of one travel agent and a former conference chairman, four conference circulars, and three letters which were typical of those sent from time to time to agents regarding their obligation under the tieing rule (R. 271, 390-397). The travel agent testified that he did not do business with non-conference lines and told customers reasons why it was better and perhaps less costly to travel tourist class than on a freighter, but that "some" customers were lost because a freighter was what they wanted (R. 46-47). The conference witness recalled one occasion when he had told an agent that under the rules the agent could not book a family with baggage and household goods who wanted to travel on a non-conference carrier direct to Italy (R.144-145). The issue, of course, is not whether the rule was ever enforced but whether its enforcement in fact contravenes any of the standards of the Shipping Act.

that no agent had lost his appointment because he booked passengers on a non-conference line (R. 420), and the Commission concedes "there was no proof that the tieing rule had been *wholly* effective in depriving outsiders of travel agents" (C. Br. 20; italics in original). In fact, there is no proof at all in the record that any "outsider"—non-conference line or member of the traveling public—had been deprived of the services of travel agents.[41]

The Commission's brief can cite no such evidence. It can only refer to the conclusory statements of the Commission that the effect of the tieing rule "is to impose serious restraints" (C. Br. 18-20). Consequently, the Commission is forced to contend that "'rationalizations, conjecture and opinion' have a place in the agency determination" (C. Br. 16). But neither these nor the Commission's conclusory statements constitute "substantial evidence" in support of the Commission's action. It was for this reason that the Court of Appeals reversed.

The Commission disapproved the tieing rule solely on the basis of the Examiner's rationale (R. 441) that the record did not demonstrate "that it was necessary to promote stability in rates or to combat destructive competition"

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[41] As the Commission now concedes (C. Br. 20), it "did not find, for example, that a non-conference carrier cannot find non-conference agents to represent it or that a prospective passenger on a non-conference line has nowhere to go to book his passage." The Commission could not have made such findings because non-appointed agents were witnesses or intervenors in this very proceeding (R. i, items 3, 4, 6; R. 21, 27, 29) and even some 10 per cent of ASTA's membership of 1,400 travel agents does not hold conference appointment (ASTA's Application to Intervene, Par. I, R. i, item 5). In addition, the Commission could have made no such finding because there was no evidence whatsoever as to the *total* number of non-conference agents. While it is clear that there are many travel agents who are not members of ASTA, there is no data in the record as to the total number of such agents nor as to how many of these do not hold conference appointment.

and "[s]uch tieing arrangements generally run counter to antitrust principles" (R. 484). Both point to the fact that all passenger lines furnishing regular transatlantic service are conference members, and that the tieing rule affects only freight services which are not full or associate conference members (R. 419, 463),—and whose business is obviously the carriage of cargo, not passengers. This, however, does not rationally support a conclusion that Shipping Act standards were violated or that the tieing rule was unnecessary.

Respondents have never claimed in this proceeding that the tieing rule is necessary to combat steamship competition in the Atlantic passenger trade.[42] They have consistently maintained that the tieing rule performs for passenger carriers the same functions performed for freight carriers by dual rate contracts advocated by the Commission (*supra,* p. 6). Both create a "tie" between the carriers and the source of their traffic and thereby induce carriers to join and remain members of conferences.

The conference system of agency selection and supervision is unquestionably one of the chief inducements TAPC can offer to hold its present members and attract new ones. TAPC member lines have incurred and continue to incur substantial expense in maintaining the conference system of selection, bonding and supervision of qualified agents for the sale of transportation on their

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[42] Without any record support the Commission's report on remand thrice asserted that respondents "admit" that the rule's purpose is "to eliminate non-conference competition" (R. 540, 563, 566). The record contains no such admission and the Commission contradicts itself by asserting that respondents "could hardly make the claim that the rule is necessary to protect the conference from outside competition, and has in fact admitted that it is not" (R. 563).

ships (R. 8), and in providing their agents with advertising and promotional materials to assist their sales efforts (R. 56). Respondents justifiably feel that if carriers wish to utilize conference-appointed agents, they should to some extent share in the expense of the conference system by accepting the readily available conference membership. If, through abolition of the tieing rule, TAPC appointed agents are made equally available to carriers, whether they continue to be members of TAPC or not, one of the principal reasons for TAPC membership would cease to exist. The stability of TAPC would inevitably be impaired and the clear intent of Congress to encourage such conferences would be defeated. The Commission made no attempt to explore these considerations; it summarily dismissed them with the comment that "respondent lines operate Caribbean cruises without the benefit of a tieing rule and no adverse consequences have resulted" (R. 485).[43]

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[43] The Commission disregarded the evidentiary inadequacy of the record pointed out by its own Vice-Chairman. As Commissioner Patterson said (R. 497-498):

> "The competitive necessity problem was not explored nor developed in this record. Even assuming this to be a valid test, the absence of any demonstration in this record proves nothing; it simply is not a basis for decision. If competitive necessity is to be a test, some effort should have been made to develop the facts on the point. Without the facts, it is no wonder the record 'did not demonstrate' anything. Since the burden is on the Commission to approve unless we can show detriment or contrariety with public interest, we may not invert the burden at the last minute and say the respondent did not prove enough. It is up to the Commission to do the proving and disproving on this issue."

The Commission must know that Caribbean cruises are operated not only "without the benefit of a tieing rule" but also without benefit of a conference—hardly proving that a tieing rule does not contribute to conference stability. Conditions in the Caribbean

(*continued on following page*)

The Commission was directed on remand to make either (1) "an adequately supported ultimate finding" that the tieing rule operates in any one of the four ways which Congress prescribed in 46 U. S. C. §814 for disapproval or (2) to approve the rule "if no such finding can be made on the record" (R. 528; 351 F. 2d at 762). The Court of Appeals found that the Commission's reaffirmance on remand of its earlier disapproval of the rule, while in terms restated, was not supported by substantial evidence.

This Court expressly recognized in *Consolo* v. *Federal Maritime Commission*, 383 U. S. 607, 619 (1966), that a reviewing court could set aside agency action if "arbitrary, capricious, [or] an abuse of discretion" or if "unsupported by substantial evidence." The latter ground was explained as follows (383 U. S. at 619-620):

> "We have defined 'substantial evidence' as 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' *Consolidated Edison Co.* v. *Labor Board*, 305 U. S. 197, 229. '[I]t must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.' *Labor Board* v. *Columbian Enameling & Stamping Co.*, 306 U. S. 292, 300. This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent

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cruise trade were not investigated in the proceedings below and have no relevance to the conditions in the Atlantic passenger trade. It is common knowledge that cruise ships, unlike respondents' transatlantic services, assume no obligation to provide regular, dependable sailings to scheduled ports all year round but are free to come and go when and where it is likely to please vacation-minded travelers and provide a profit to the carrier.

an administrative agency's finding from being supported by substantial evidence." [Citations and footnote omitted.]

The Commission's report on remand points to no evidence which satisfies that definition. The ultimate findings couched in the language of the statute (*i.e.*, detriment to commerce, unjustly discriminatory between carriers, contrary to the public interest [R. 565]) are, of course, no better than the intermediate findings upon which they rest and the latter, in turn, must be tested by the underlying evidence offered to support the entire structure. Here, as already pointed out (*supra*, p. 31), there is no relevant evidence "a reasonable mind might accept as adequate to support" (383 U. S. at 620) the general conclusions of "pernicious" effect upon travel agents, non-conference carriers and the traveling public on which the Commission relies to condemn the tieing rule (R. 565; C. Br. 21).[44]

Conceding to the Commission all the expertise due it as the agency charged by Congress with the administration of the Shipping Act, its conclusions unsupported by substantial evidence cannot be the basis of a valid order under that Act. Whatever the role of "rationalizations, conjecture and opinion * * * in the agency determination" (C. Br. 16), this Court has never treated them as substitutes for substantial evidence. *Federal Trade Commission*

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[44] This total lack of substantial evidence is what distinguishes the instant case from the *Consolo* case, upon which petitioners rely (C. Br. 15; A. Br. 20-21, 35-40). This Court pointed out in *Consolo* that the standard of review does not permit a reviewing court to reverse agency action based upon substantial evidence simply because the court believes the evidence could support a conclusion contrary to that reached by the agency (383 U. S. at 618-619). That is not the situation here.

v. *Raladam Co.*, 283 U. S. 643 (1931).[45] *National Labor Relations Board* v. *Brown*, 380 U. S. 278 (1965).[46] Nor does "expert judgment" (see, *e.g.*, C. Br. 15, A. Br. 20, 40) give an administrative agency discretion to rule as it pleases. As this Court has said, quoting from a dissenting opinion in an earlier case,[47] " 'unless we make the requirements for administrative action strict and demanding, *expertise*, the strength of modern government, can become a monster which rules with no practical limits on its discretion' " (italics by the Court). *Burlington Truck Lines, Inc.* v. *United States*, 371 U. S. 156, 167 (1962), also citing *Federal Communications Commission* v. *RCA Communications, Inc.*, 346 U. S. 86, 90 (1953).

It is plain that the Commission's disapproval of the tieing rule was based entirely upon asserted antitrust principles in disregard of the instructions of the Court of Appeals in this case (R. 527; 351 F. 2d at 761-762). The Commission persisted in this course apparently believing that its expert judgment entitled it to disagree with the reviewing court (R. 541). The Commission, however, is not an expert in the application of the antitrust laws and in

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[45] In *Raladam* the Court affirmed reversal of a Federal Trade Commission order because "there is neither finding nor evidence from which the conclusion legitimately can be drawn that these advertisements substantially injured or tended thus to injure the business of any competitor or of competitors generally, whether legitimate or not" (*Id.* at 652-653). As the Court said, "All this was left without proof and remains, at best, a matter of conjecture. Something more substantial than that is required as a basis for the exercise of the authority of the commission" (*Id.* at 653).

[46] In *Brown* the Court again upheld reversal of agency action. As it said, "In sum, the Court of Appeals was required to conclude that there was not sufficient evidence gathered from the record as a whole to support the Board's finding that respondents' conduct violates" the statute (*Id.* at 290).

[47] *New York* v. *United States*, 342 U. S. 882, 884 (1951).

so acting it clearly exceeded its competence.[48] As this Court pointed out in *Federal Communications Commission* v. *RCA Communications, Inc., supra, viz.* (346 U. S. at 91):

> "The Commission * * * seems to have relied almost entirely on its interpretation of national policy. Since the Commission professed to dispose of the case merely upon its view of a principle which it derived from the statute and did not base its conclusion on matters within its own special competence, it is for us to determine what the governing principle is."

The Court of Appeals did not misunderstand the Commission's role under Section 15 of the Shipping Act as contended here (C. Br. 15; see *infra*, p. 56). The court correctly instructed the Commission to make adequate supporting findings under the Shipping Act, *i.e.*, findings based upon substantial evidence. The Commission chose to apply antitrust principles exclusively in obvious frustration of congressional policy. The Court of Appeals on the second review was entitled to treat this as a tacit admission that no such evidence could be produced and to reverse the Commission's order as unsupported by substantial evidence. In so doing, the court properly followed this Court's guideline in *National Labor Relations Board* v. *Brown, supra, viz.* (380 U. S. at 291-292):

> "Reviewing courts are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory

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[48] Illustrative is the Commission's mistaken description of the tieing rule as a "tieing arrangement" and its statement that "[s]*uch* tieing arrangements generally run counter to antitrust principles" (emphasis supplied) (R. 484). The rule, of course, is not a tieing arrangement and petitioners now make no such claim.

> mandate or that frustrate the congressional policy underlying a statute. . . . Of course due deference is to be rendered to agency determinations of fact, so long as there is substantial evidence to be found in the record as a whole. But where, as here, the review is not a question of fact, but of a judgment as to the proper balance to be struck between conflicting interests, '[t]he deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress.' *American Ship Building Co.* v. *Labor Board,* [380 U. S. 300 (1965)] supra at 318."

Similar infirmities invalidate the Commission's condemnation of the conference unanimity rule.

## II.

**The reasons advanced by the Commission for disapproving the unanimity rule are unsupported by substantial evidence and do not establish any violation of Shipping Act standards.**

Agents' commissions are, of course, an expense of passenger carrier operation which directly affect net revenues (R. 70, 72, 73). If there were no conference agreement, each individual line would decide for itself the amount of commission it would pay its agents (R. 442). The Examiner had no difficulty recognizing that the unanimity rule was necessary because lines entering into a conference agreement would not wish to completely surrender control over financial decisions which might affect their ability to compete or even survive as against carriers having greater resources (R. 442). All member lines for this reason urged

the Commission to continue its approval of the unanimity rule as a fair and practical accommodation of conflicting interests which had worked satisfactorily for many years with Commission approval. As the Examiner pointed out, only "a clear violation of section 15" justified disturbing the lines' business judgment in this respect (R. 442-443).[49]

The Examiner, moreover, found uncontradicted evidence that "the unanimity rule was of substantial value to the American-flag lines" (R. 423), who are greatly outnumbered by the foreign-flag carriers in the conferences and whose operating and capital costs are higher (*supra*, p. 2, fn. 2).[50]

The Commission's ultimate response was that "this rule, as implemented contrary to the considered business judgment of nearly all the conference members, has worked to the detriment of the commerce of the United States" (R. 551). Not only are the reasons advanced for this conclusion without a basis in substantial evidence, the conclusion itself is wholly at odds with the record evidence and other Commission findings.

The Commission's disapproval of the unanimity rule as detrimental to commerce under the Shipping Act is

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[49] The Court of Appeals on the first review, though recognizing the Commission's right to disapprove previously approved agreements (which respondents do not question), agreed that "where disapproval follows a history of prior approvals * * * we think that the finding should be scrutinized by a reviewing court with greater care" (R. 521; 351 F. 2d at 759).

[50] See S. Rep. No. 860, 87th Cong., 1st Sess. (1961), where the Senate Committee pointed out (p. 5):

> "No extended discussion is needed of the fact that the operating and capital costs of American-flag ocean common carriers are considerably higher than those of any other nation. Since most carriers cannot operate as cheaply as some competitor which possesses national cost advantages, the conference affords a device whereby all carriers working as a group, set rates at a point where such an advantage is not absolutely controlling."

bottomed on the same evidence the Examiner found inadequate. Commission hearing counsel and ASTA had contended that the rule "blocked or unduly delayed" APC action to "increase" agents' commissions, thereby allowing the airlines "to hold a superior competitive position" to the detriment of the commerce of the United States (R. 441-442). The Examiner rejected those contentions in recommending continued approval of the rule (R. 442):

> "As pointed out on page 39 [R. 422], the record in this proceeding does not prove that the commissions would have been increased any more than they have been increased if the Unanimity Rule had not been in existence. It would require mere conjecture to find what conclusions might have been reached by the conference if a majority rule had been applicable or a two-thirds rule or a seventy-five percent rule. Even assuming that a majority of the lines might have preferred to increase the rate of commission, it cannot be concluded that the Unanimity Rule must be stricken down as being detrimental to commerce under section 15."

The Commission itself, although overruling the Examiner's recommended approval (R. 449), found the record did not establish that commissions to agents were responsible for the relative decline in sea travel versus air travel, which it attributed "to factors unrelated to the steamship passenger industry, such as the increased seating capacity and speed provided by the new jet aircraft, and the introduction of many new foreign air carriers serving the United States" (R. 481; see pp. 21-22, *supra*).

As for the commission rate itself (or "level" as the Commission termed it), the Commission agreed with the Examiner "that the record in this proceeding does not support

a finding that the level of commissions is unreasonably low" (R. 481), or that any sufficient showing had been made "to declare that such levels are detrimental to the commerce of the United States or otherwise unlawful under section 15 [of the Shipping Act]" (R. 482).

Despite its recognition that no actual detrimental result had in fact been established, the Commission nonetheless concluded that the unanimity rule should be disapproved as operating to the detriment of the commerce of the United States (R. 478). The two reasons given for this conclusion (R. 478, p. 21, *supra;* R. 560) are demonstrably not based upon substantial evidence in the record. They do not, in any event, support the ultimate conclusions. Additionally, they are negated by the Commission's acknowledgment that the commission rate has not been shown to be unreasonably low or detrimental to the commerce of the United States or otherwise in violation of Section 15 and by its finding that the greater growth of air travel compared with sea travel is largely attributable to the expansion and improvement of air transportation (R. 481).

### A. *No Substantial Evidence Supports the Conclusion That the Unanimity Rule Prevented Conference Agents From Rendering Complete and Effective Service.*

The first reason advanced by the Commission for condemning the unanimity rule as detrimental to commerce was that it prevented travel agents from rendering complete and effective service, both to passengers and to ocean carriers (R. 478). This reason—always difficult to comprehend—evolved into the contention that because travel agents are motivated by economic self-interest, "the undecided traveler" is deprived of his "right" to deal with an agent free of such motivation (R. 560). No mention is

made of this in the Commission's brief here; instead, it is suggested that the conference lines ought to know that the "rate of commissions * * * is likely to influence the action of travel agents in suggesting one mode of travel over another", thereby placing the steamship lines in an adverse competitive position (C. Br. 25-26). The Commission thus admits that it is not the unanimity rule but the *rate* of commission which is the alleged offender. This, of course, is negated by the other findings the Commission made.

As the Court of Appeals pointed out on the first review (R. 522-523; 351 F. 2d at 759):

> "On the basis of the Commission's own statement, therefore, it is not the unanimity rule, but economic factors which prevent agents 'from rendering complete and effective service both to passengers and to ocean carriers'—if by that the Commission meant the 'pushing' of air over sea travel.[7] And the Commission's opinion suggests no other way in which complete and effective service by appointed agents is prevented."

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"[7] Although the Commission did not refer to it, the record shows that sales of transportation on steamship lines have been increasingly adversely affected by the preference of many travelers for air transportation. As the Examiner noted, this preference is due in part to the pushing of air travel by agents in their own interests, and in part to the saving of travel time, particularly on jets, extensive advertising by airlines, and other factors. * * *"

The "economic factors" the court referred to include the undeniable inherent differences between air travel and sea travel. Even the Commission found that the only evidence of "diversion" from sea to air passage against the best interest of prospective passengers "related solely to the activities of agents who were not appointed by the con-

ference lines" (R. 477). Moreover, the record shows without contradiction that once an agent was appointed by member lines, and accordingly received a commission for his efforts, he pushed sea as well as air travel (R. 19, 22, 23, 24, 26, 31).

The Commission added nothing to the record after remand by the Court of Appeals (R. 652; 372 F. 2d at 933). If anything, its report on remand confirmed the lack of any evidence that the unanimity rule prevented agents from completely and effectively servicing passengers and carriers, by pointing out (R. 538):

> "The record discloses no evidence that a specific traveler has been persuaded to air travel against his desires or to his disadvantage." [51]

### B. *No Substantial Evidence Supports the Conclusion That the Unanimity Rule Is a Source of Competitive Disadvantage to the Conference Lines.*

The Commission's second reason for invalidating the unanimity rule is essentially no more than an objection that it has prevented a presumed majority of conference mem-

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[51] This is why the Commission retreated after remand to its "definite tendency" theory based on one travel agent's testimony that " . . . *if* it is easier to sell someone an air line-ticket *and* if it is a *tour* where you make more money, there is a definite tendency to sell air travel" (R. 538; emphasis supplied). Even this one agent does not say there is a definite tendency to push *non-tour* airline bookings. This testimony was clearly directed to the fact that at the date of the testimony the tour rate for airlines was 10 per cent and the tour rate for steamship lines was 7 per cent. Thus, there was then an *actual* rate difference on tour sales—although not on other sales. That difference was eliminated in December, 1962, more than a year before the Commission's original report, when the lines adopted a 10 per cent tour rate (R. 537). Since then there has been no actual rate difference and thus no rational basis in the record to support the Commission's "definite tendency" finding either with respect to tour or non-tour steamship travel.

bers from imposing their presumed will upon all members in the matter of agents' commissions. The Commission's assertion that the unanimity rule is "unfair" as between the member lines (R. 557) is belied by the fact that not a single member line objected to the rule and all are in fact appearing here and urging its approval. This is undoubtedly the reason why the Commission's brief no longer refers to that ground and relies only upon claims that the rule was "detrimental to commerce and contrary to the public interest" (C. Br. 22).

The Commission's conclusion of competitive disadvantage in its opinion is founded on the supposition that what it refers to as "evidence" supports a finding that a minority of conference members "defeated", "delayed", "watered down", "blocked" or "vetoed" the desires of a "strong majority" to increase agents' commissions to meet the competition of the airlines (R. 478, 536, 554).

*First,* the Commission's "evidence" does not say what the Commission claims and the Commission's discussions of this reflects a complete misunderstanding of the workings of the conference as clearly set forth in the record.[52] In

[52] Apart from administrative matters handled by a conference secretary, APC business is conducted at general meetings of the "Principals" of the member lines held, as required by Agreement 7840, in March and October of each year and at such special meetings as may be called from time to time (Ex. 2, R. 209-211). The Principals are top executives of the member lines, *i.e.*, actual heads of the lines, general managers, directors or their European equivalents, having authority to bind their respective lines (R. 109). At their meetings the Principals consider all matters which involve the overall operation of the lines, including passenger fares and rates of commission payable to agents (R. 65). The minutes of these meetings, reflecting agreed actions, are signed by each of the Principals and, as required by Agreement 7840, filed with the Commission (R. 69; Ex. 100, R. 376).

(*continued on following page*)

five of the nine instances of "conference" inaction referred to by the Commission (R. 553), the references are to meetings of subcommittees not Principals.[53] These subcommittees had no power to bind or otherwise act for the member lines, but were authorized only to make recommendations (Ex. 2, R. 211; Ex. 50, R. 272; R. 421-422). Meetings of the Principals can and do take action which has not been unanimously recommended by a subcommittee and even unanimous recommendations by a subcommittee can be and have been disregarded by the Principals (R. 111, 476, 552).[54] Only the Principals can change the commission rate. Moreover, subcommittees may and do make recommendations to the Principals even when there is no unanimity in the subcommittee (R. 111, 367).

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All matters of joint action are decided by the Principals by unanimous agreement. The practice is to have full and free discussion as a result of which positions are altered and proposals modified until, more often than not, unanimous agreement is reached (R. 68-69, 77, 111, 422). From as far back as the early 1920's, there has never been a time when action desired by a large majority of the members—on the question of rates of commission, for example—was blocked by a small minority (R. 68, 77-78, 114, 118-119, 128). Those questions on which action is deferred or that are not disposed of at any given meeting are referred back to a subcommittee of passenger traffic managers or equivalent officials for further exploration and study, often with instructions from the Principals, with a view to presenting new recommendations which might attract unanimous acceptance at a subsequent Principals' meeting (R. 129-130).

[53] Meetings of March 8, 1950 (R. 535); October 9, 1950, erroneously described as March 9 (R. 314-315); October, 1951 (R. 280, et seq.); June, 1952 (R. 536); October, 1952 (R. 332, 536).

[54] There is no basis in the record for the Commission's statements that subcommittee "determinations . . . are apparently conditions precedent to any conference action with respect to the level of commissions" and that "the record, moreover, affirmatively shows that a lack of unanimity on several occasions prevented the subcommittee from reporting the positions of the lines to the principals" (R. 98-100, 111, 367, 476).

In four of these five instances, although lack of unanimity (and perhaps even a lack of majority—the record as to one instance does not show) prevented a subcommittee from unanimously recommending a *particular* commission increase, as the Commission contends, it also shows that specific recommendations concerning commission increases were nevertheless submitted to the Principals for consideration.[55]

In not one of the instances where Principals, rather than subcommittees, were involved does the record show that a majority of Principals favored a commission increase.[56]

One of these instances referred to by the Commission was a May 3, 1960 Principals' meeting (R. 553). The only record reference to such a meeting simply reflects that "all [lines] agree some action necessary encourage tour traffic and majority favour establish as trial ten percent commission for advertising inclusive tours * * * and matter referred TAPC for positive recommendation for considera-

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[55] Meetings of March 8, 1950 (R. 313, 535), October 9, 1950, erroneously described as March 9 (R. 535), October, 1951 (R. 280, 535), October, 1952 (R. 332, 536).

[56] Meetings of March 1, 1951 (R. 316, 535), March, 1952 (R. 329, 536), February-March 1956 (R. 536, 553), and May 3, 1960 (R. 537, 553).

Also incorrect is the reference to "records of United States Lines" regarding the meeting in February-March 1956 where "one of the lines exercised its veto power under the unanimity rule" (R. 536). The memorandum simply refers to "the only Line who indicated strong objection"; it does not refer to a veto; nor does it say no other lines had any objections (R. 374(2)). The same correspondence, moreover, shows that United States Lines itself was not in favor of an immediate commission change (R. 374(2)). Finally, as noted *supra*, p. 22, fn. 38, the correspondence shows that the line who had "strong objection" had already committed itself to an increase in agent's commission but simply wished to advance an alternative proposal for an even higher rate in low season to attract business (R. 374(3), 374(8)).

tion principals October next" (R. 374(1)). Far from evidencing any frustration of a majority desire, the exhibits show as to this subject that:

> "The 10% commission on inclusive tours and payment of 50% of the cost of folders were primarily the views of the Holland Line and supported by a few others. However, our position [United States Lines], as well as the majority of lines, was that the matter should receive careful consideration * * * we [United States Lines], as well as many of the others, felt that we should not get into the tour business and it would require a great deal of study before reaching a decision" (Meeting of March 1960; R. 374(1)).

After that study had been made, respondents unanimously adopted a tour advertising allowance for their appointed agents in May 1961 (R. 376), and in December 1962 increased the rate of commission on tour travel to 10%, as the Commission acknowledges (R. 536-537).

*Second,* the Commission's "evidence" of Shipping Act violation is not only out of step with the actual evidence but is demonstrably inadequate to be reasonably accepted as supporting a conclusion that the unanimity rule operates to the detriment of the commerce of the United States. Implicit in the Commission's conclusion are assumptions that (1) respondents have been guilty of inaction with respect to agents' commissions, (2) earlier increases in the commission rate would have occurred without a unanimity rule, (3) these would have increased the sale of steamship bookings by travel agents, and (4) the increased expenditure for commissions by the conference carriers would have been in their interest and that of the traveling public. Those assumptions are either disproved or unproved.

(1) Nothing is better documented in the record than that APC Principals have continually considered and acted upon the question of commission levels during the ten-year period covered by the Commission's investigation, and long before that (R. 80, 110; see also record references cited p. 14, fn. 28, *supra*). The Commission, moreover, has conveniently ignored the fact that for portions of the period covered by the investigation, the steamship lines actually paid a *higher* commission rate than the airlines during the off-season when passenger space was abundant. For example, from 1952 through 1953 the 6 per cent airlines commission on off-season tourist class travel was 1½ per cent *below* the comparable steamship commission rate of 7½ per cent (R. 374(6), 297). Similarly, from 1953 through 1956 the airline commission rate for both first and tourist class off-season travel was ½ per cent *below* the comparable steamship commission rate (R. 374(7)).

(2) The Commission's assertion that "but for the unanimity rule the majority * * * would have increased agents' commissions" (R. 560-561) is totally unsupported, as we have shown (*supra*, pp. 45-48). As the Examiner pointed out, there is no proof that steamship "commissions would have been increased any more than they have been if the Unanimity Rule had not been in existence" (R. 442).

(3) The higher off-season steamship commission rates mentioned above did not impede the overall trend toward airline travel during the periods they were in effect; there is no evidence in the record that, nor is there any reason why, a higher rate in any season would do so today. Indeed, the record reflects that after equalization of the air-sea disparity during high season by the increase in the steamship commission rate to 7 per cent in 1956, the sale

of steamship bookings in the United States showed little, if any, increase as jet aircraft came into service (Ex. 96, R. 371; R. 431). These figures demonstrate that no cause and effect relationship as to passenger bookings can be attributed to the differences in commission rate.

Because the Court of Appeals pointed out in its first opinion that there was no finding that a higher rate of commission would improve the competitive position of the steamship lines (R. 524), the Commission on remand went through the motions of making such a finding (R. 557). It pointed to no new evidence and made no new findings of fact to support such a conclusion. An administrative agency cannot so easily support its decisions by "substantial evidence" by parroting in conclusory language a finding the reviewing court had pointed out it had previously been unable to make.

The Commission could not properly make the previously missing finding because it is in direct conflict with two other findings (1) that it was economic factors that account for the growth of air travel (*supra*, p. 41) and (2) that the steamship commission rate has not been shown to be unreasonably low (*supra*, p. 16).

(4) There is nothing in the record to support the Commission's assumption that an increase in agents' commission rates would be in the interest of the carriers or the public. Such evidence as there is points the other way. One American-flag carrier Principal testified that vessel operating expenses have increased and his line was "somewhat worse" off economically since the 1956 commission increase (R. 73). Yet the lines cannot increase passage rates because "we are confronted with a competitor [the

airline industry] who is committed to a solid policy of reducing fares" (R. 74).[57]

### C. *No Substantial Evidence Supports a Conclusion That the Unanimity Rule Violated Any Other Section 15 Standard.*

The Commission on remand also asserted that the unanimity rule produced results "detrimental to the commerce of the United States" and "unfair as between the majority of carriers" and was "contrary to the public interest" (R. 566-567). But it referred to no evidence supporting these conclusions except the very same "evidence" it discussed in connection with its conclusions that the unanimity rule prevents agents from rendering complete and effective service and that it is a source of competitive disadvantage to the conference lines. As we have shown (*supra,* pp. 42-51), this did not constitute substantial evidence in support of such conclusions of the Commission. For the same reasons its does not constitute substantial evidence in support of its additional conclusions.

In the final analysis, the Commission's disapproval is not based on any characteristic inherent in the unanimity

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[57] He also pointed out that "[o]ne jet [airplane] costing $6 million can carry trans-Atlantic traffic equal to the capacity of the [S.S.] UNITED STATES in one year" (R. 75).

Also apposite is Vice-Chairman Patterson's dissenting opinion (R. 495):

> "To the extent economics are relevant, this record is devoid of data showing the effect of a change in commissions either up or down on the respective parties or on the public. Naturally, the travel agents want more money, but we would have to know a great deal more than we can learn from this record as to the effect of an increase on passenger fares and on the precarious competitive balance that now seems to exist between ocean and air transportation. Passenger choices would seem to be governed as much by convenience and pleasure as by economics or passenger agent activity."

rule other than the fact that it can, at least in theory, produce results contrary to the desires of the majority. The unsubstantiated assertion that the unanimity rule "frustrated" the wishes of the majority is in essence the only reason given by the Commission for its disapproval. In fact, the Commission expressly stated (R. 555):

> "The evidence of the blocking of the desires of a majority of the member lines to achieve their goal present in this proceeding is a sufficient reason for declaring the unanimity rule detrimental to the commerce of the United States."

As the court below has recently told the Commission, "[t]his says no more to us than that, where unanimity is made the order of the day, approval must be withheld." *U. S. Atlantic & Gulf/Australia—New Zealand Conference* v. *Federal Maritime Commission,* 124 U. S. App. D. C. 303, 364 F. 2d 696 at 699 (1966). The Commission's reasoning would render unanimity rules invalid *per se,* a result that even the Commission would disclaim.

The Commission's awareness of the lack of substance in its factual predicates has forced it to fall back on suggestions that (1) respondents are responsible because they failed to "keep and provide the requisite records" (R. 554; see also R. 476) and (2) the Civil Aeronautics Board has recognized the need for curbing the effects of the airline industry's unanimity provision, citing *IATA Traffic Conference Resolution,* 6 C.A.B. 639, 645 (1946); *North Atlantic Tourist Commissions Case,* 16 C.A.B. 225, 229 (1952) (C. Br. 23). Not only are these not reasons under the Shipping Act for condemning the unanimity rule but they also lack substance.

(1) Petitioners throughout have been attempting to substitute for the missing supporting findings of fact allega-

tions that respondents' failure to keep and file complete conference minutes has been responsible for the Commission's inability to make such findings (R. 476, 554; C. Br. 23-24; A. Br. 10 and fn. 9, 13 and fn. 13, 48). But the record is clear that conference minutes were filed as required by Commission regulations (*supra*, p. 8), and that Commission hearing counsel made a "searching review of the conference records" (R. 403)—not merely filed minutes but also conference and member lines' correspondence (see, *e.g.*, R. 241-376, 395-397). The documentary exhibits received in evidence exceed 1,700 pages (A. Br. 6). The Commission's grievance is not that records were not produced but that they do not support what the Commission claims.[58]

(2) The Commission derives no support from the Civil Aeronautics Board's actions under the act it administers. Passing over the differences between the Civil Aeronautics Act and the Shipping Act, between the competitive situation in air and in sea transportation and between passage fares and agency commissions, it suffices to point out that the International Air Transport Association (IATA), the conference of international air carriers, operates under a unanimous voting rule and still sets fares and commissions only by unanimous agreement. As the former Chairman

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[58] Another Commission allegation, repeated by ASTA here (A. Br. 13, fn. 13), requires answer—a charge that the conference "purposely adopted this practice [failing to keep records] because of its concern over the American antitrust laws" (R. 476). This is apparently a reference to testimony of an ASTA former president that at a meeting he attended in 1957 between representatives of I.C.C.T.A. and APC, he was told by a member line representative that no "minutes [would be] published or circulated" because of the Sherman Anti-Trust Act (R. 60-61). Even accepting this hearsay testimony at face value, it does not support the Commission's charge. The meeting referred to was not a meeting of APC. It was not one at which any APC action was or could have been agreed upon. Neither the Shipping Act nor approved APC Agreement 7840 required that minutes of such a meeting be kept or filed.

of the Civil Aeronautics Board (now Secretary of Transportation) said, that rule was "originally adopted and insisted upon by the United States to protect each carrier's right of individual action, * * *" (R. 546). While stating that the rule "has its deficiencies," his conclusion was (R. 547):

> "However, I am inclined to conclude these are less than those which would stem from a form of majority vote." [59]

If *IATA Traffic Conference Resolution,* 6 C.A.B. 639 (1946) (C. Br. 23), has any relevance here, it is only because it *upheld* a unanimous voting requirement in order to "preserve the right of any carrier to take independent action" (6 C.A.B. at 645). *North Atlantic Tourist Commissions Case,* 16 C.A.B. 225 (1952) (*Id.* 23), also upheld the "fixing of commissions by agreement" under the IATA unanimity rule as not "adverse to the public interest" (16 C.A.B. at 227).

The Commission itself, in a general rule-making proceeding, adopted regulations in 1966 pertaining to conferences which expressly provide for unanimous voting provisions in addition to alternative methods (46 CFR §537.2). Moreover, in a separate proceeding relating to freight conferences, the Commission is proposing to sanction the use of a unanimity rule for fixing brokerage commissions, a comparable situation in freight transportation. It has put forward a sample form of conference agreement "which could, in most instances, result in approval without the necessity for formal hearings". The form agreement provides, *inter alia*:

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[59] Boyd, *The Future of the International Carrier,* Flight Forum 7, September, 1964.

"1. Unanimous consent shall be required:

* * * * *

"d. To agree upon amounts of brokerage, commissions or other compensation to be paid brokers or forwarders as permitted by applicable law; (optional)" [60]

## III.

**The Commission cannot disapprove the conference rules on the basis of national antitrust policy or conference failure to justify a need for them, in lieu of substantial evidence of violation of Section 15 standards.**

### A. *Congress Has Provided for the Accommodation of the Shipping Act and the Antitrust Laws.*

The Court of Appeals in its 1965 opinion instructed the Commission as to its authority under Section 15 of the Shipping Act, 1916, as follows (R. 527; 351 F. 2d at 761):

"The statutory language authorizes disapproval only when the Commission finds as a fact that the agreement operates in one of the four ways set out in the section by Congress.[9]

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"[9] This is not to say of course that the Commission must completely separate itself from antitrust principles in determining whether an agreement operates detrimentally to United States commerce, or against the public interest, or unfairly as between carriers, or in violation of the Shipping Act. Cf. Isbrandtsen Co. v. United States, 93 U. S. App. D. C. 293, 299, 211 F.2d 51, 57, cert. denied sub nom. Japan-Atlantic & Gulf Conference v. United States, 347 U. S. 990, 74 S. Ct. 852, 98 L. Ed. 1124 (1954), where we pointed out that the prohibitions of the antitrust laws are not to be invaded 'any more than is necessary to serve the purposes' of the Shipping Act."

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[60] Docket No. 67-55, *Rules Governing the Filing of Agreements Between Common Carriers of Freight by Water in the Foreign Commerce of the United States* (46 CFR Ch. IV). Reported only in Pike & Fischer, *Shipping Regulation*, SR p. 321:61 at 321:69.

The court also pointed out (R. 527; 351 F. 2d at 761):

> "We do not read the statute as authorizing disapproval of an agreement on the ground that it runs counter to antitrust principles, the theory on which seemingly the Commission's disapproval rests here. Many of the matters covered by conference rules are restrictive and even monopolistic in tendency. Yet, if the agreement is approved under 46 U.S.C. §814, an exemption from the antitrust laws is specifically given by that section."

The Court of Appeals' instructions to the Commission were clear and in accord with the intent of Congress as recognized by this Court in *Carnation Co.* v. *Pacific Westbound Conference*, 383 U. S. 213 (1966), cited by petitioners (C. Br. 12, 13, 17; A. Br. 19, 27, 28). This Court in *Carnation* specifically referred to Section 15 of the Shipping Act as "an accommodation provision" (*Id.* at 218). It also concluded that

> "the language of that provision must have been selected [by Congress] as a matter of deliberate choice in order to indicate the extent to which the industry's rate-making activities remain subject to the antitrust laws as well as the extent to which those activities are exempted from antitrust regulation" (*Id.* at 220).

In Section 15 Congress expressly spelled out how the Shipping Act and the antitrust laws should be accommodated. It prescribed only four grounds on which an agreement covered by that section could be disapproved, in which event the antitrust laws would be applicable. It provided that if a Section 15 agreement did not contravene any one of these Shipping Act standards, it "shall" be approved by

the Commission and that the antitrust laws would then be inapplicable. Congress has thus determined that invasion of the antitrust laws is justified in the shipping industry unless that invasion would also violate one of Section 15's specific standards. For the Commission, as here, to conclude that because agreements violate the antitrust laws they therefore violate the Shipping Act is to ignore the standards for reconciling those statutes which Congress deliberately chose.

In obvious disagreement with this construction of the Shipping Act, the Commission would disapprove the conference rules on antitrust grounds. Thus the Commission argues that the tieing rule is a boycott illegal *per se* and therefore the Commission would have been justified in disapproving it, without more, unless a compelling justification was shown (C. Br. 18-19). But this proves much too much. The principal reason for the existence of every conference is rate fixing. Absent the immunization granted by Section 15 this would be a *per se* violation of the antitrust laws. Yet, that a conference involves rate fixing, as all do, has never been viewed by the Commission as a ground for disapproving the relevant conference agreement "unless a compelling justification was shown" to the Commission as now contended (C. Br. 19).

Congress has already found compelling justification for the conference system. It has consequently directed the Commission to approve conference agreements unless found in conflict with a specific Shipping Act standard. Congress did not say, as petitioners in effect contend, that the Commission should approve all those agreements that would not otherwise involve *per se* violations of the antitrust laws, but should disapprove those that would, "unless a compelling justification was shown."

Any such interpretation of Section 15 would require a finding by the Commission as to each conference agreement submitted to it that there was a compelling justification for the conference system. But this has never been the law or the practice of the Commission. Even the Commission concedes that "some anticompetitive agreements are condoned in the maritime area—notably, the conferences themselves" (C. Br. 18). And when the 1961 amendments were before Congress the Commission requested the deletion from the proposed legislation of a provision that would have required it to make just such a finding before approving an agreement. As a result, this provision was deleted from the legislation as enacted (*infra*, pp. 61-62).

Even at the time of the enactment of the original Shipping Act, Congress considered the prohibition of the "agreements and understandings, now so universally used * * * with a view to attempting the restoration of unrestricted competition." [61] But the Alexander Report rejected this proposal. It was the "view of the Committee that open competition can not be assured for any length of time by ordering existing agreements terminated." It recognized that "[t]he entire history of steamship agreements shows that in ocean commerce there is no happy medium between war and peace when several lines engage in the same trade." [62]

Oblivious to this background and the long history of approved operation under the rules in question, the Commission insists that they should be disapproved on *per se* antitrust grounds alone, since respondents have not shown that their asserted anti-competitive effects are justified

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[61] Alexander Report, p. 415.

[62] *Ibid.*, p. 416.

by any serious transportation need or legitimate purpose (R. 561; C. Br. 24-26). The tieing rule is said by petitioners to be "pernicious * * * on its face" because it is a "group boycott"[63] (C. Br. 18; A. Br. 24); the unanimity rule is condemned as a *per se* "price fixing" provision, which prevents majority rule (C. Br. 23-24; A. Br. 23-28).[64]

The Commission's present view that the conference unanimity rule is invalid on antitrust grounds is in sharp contrast to its own decision in *Pacific Coast European Conference Agreement,* 3 U. S. M. C. 11, 20 (1948), where the Commission held:

> "There are conferences which have the unanimous, two-thirds, three-fourths, or majority voting rules. No one of these can be disapproved as an organizational procedure, but the lawfulness of any of them must be based upon evidence as to their working in practice as introduced in a public hearing. Tests of lawfulness are found in actions or courses of conduct, not in organizational procedure."

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[63] Although petitioners agree that the tieing rule is a "group boycott", they disagree as to the target of the boycott. The Commission says it is the non-conference (freight) carriers (C. Br. 17-18); ASTA says it is appointed agents who violate the rule (A. Br. 5). Neither contention is supported by any substantial evidence.

[64] As for the price fixing effects of the unanimity rule (A. Br. 23), the dissenting observation of Vice Chairman Patterson is apposite (R. 495-496):

> "* * * the better public interest arguments, if anything, favor the validity of the obligation to not change commission rate levels without unanimous consent. * * * If anti-trust law overtones are to be injected into our policy considerations, then anything which lessens the power of a group which makes dominating pricing decisions is to be favored. U. S. flag lines are a minority in most conferences, and the rule enhances their power to influence group decisions or to protect themselves from oppression by the business needs of non-American lines. Generally the business needs of non-American member lines are dictated by more favorable cost considerations than our own."

*Oranje Line* v. *Anchor Line, Ltd.*, 5 F. M. B. 714, 730 (1959), is to the same effect.

**B. *The 1961 Amendments to the Shipping Act Did Not Authorize the Commission to Disapprove the Conference Rules on Antitrust Grounds.***

Having come up with no substantial evidence that either conference rule was detrimental to commerce or unjustly discriminatory or unfair as between carriers (*supra*, pp. 30-55), the Commission seeks to defend its order on the basis of "a broad grant of authority" conferred upon it by Section 15 of the Shipping Act. The Commission relies particularly on the 1961 amendment in which Congress inserted "contrary to the public interest" as an additional ground for disapproval of agreements under Section 15 (C. Br. 14). The Commission now suggests that this new ground gives it "a wide range of discretion" to disapprove "an anti-competitive agreement" when no serious justification is advanced for it (C. Br. 20-21).

Such a "back door" intrusion of antitrust concepts into Section 15 is completely contrary to Congressional intent, to the Commission's own position at the time the "public interest" amendment was under consideration, and to the teachings of this Court.

(1) As already noted (*supra*, p. 7), it was not the intent of Congress, in amending the Shipping Act in 1961, to broaden the role of antitrust principles in relation to the Shipping Act despite strong Department of Justice urging. The legislative history of those amendments makes clear that "our traditional antitrust concepts cannot be fully applied to this aspect of international commerce." [65]

[65] S. Rep. No. 860, 87th Cong., 1st Sess., p. 2 (1961), *supra*, p. 7.

Indeed, the Department of Justice itself pointed out, at the time of the adoption of the 1961 amendments, that:

> "because of the international nature of the shipping industry, the supervision which the Board may exercise is quite limited and hardly comparable to the more comprehensive regulation exercised with respect to domestic transportation industries by such agencies as the Civil Aeronautics Board and the Interstate Commerce Commission." [66]

For the Commission now to say that the "public interest" standard empowers it to deny antitrust exemption to shipping interests of this and other nations banded in a conference, unless they affirmatively show their agreements are in the public interest (or there is "a compelling justification") completely nullifies the intent and purpose of Congress, and the Commission's express request to Congress with respect to such legislation as well.

(2) The original House bill in 1961 contained language which would have authorized the Commission to approve only agreements "it affirmatively finds to be in the public interest." [67] But the Commission then was opposed to such a proposal, since it thought that "requiring a positive finding in favor of the public interest would prevent carriers from operating under arrangements which, although not meriting disapproval under the standards of the statute, could not be shown to positively contribute to the public interest." [68] The final House version adopted the Commission's phraseology, which required approval of all

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[66] S. Rep. 860, 87th Cong., 1st Sess., p. 31 (1961).

[67] H. Rep. 498, 87th Cong., 1st Sess., p. 18 (1961).

[68] *Ibid.*, p. 18.

agreements that it "finds not contrary to the public interest."[69]

The Senate version of the Section 15 amendment which finally became law also incorporated the Commission's recommendation but in keeping with the original form of Section 15. That version provided that the Board shall "disapprove * * * any agreement * * * that it finds * * * to operate to the detriment of the commerce of the United States, or to be contrary to the public interest", and that it "shall" approve all others (46 U. S. C. §814).

The Commission is, of course, bound by that version and cannot now change the provisions of the Act. *National Labor Relations Board* v. *Insurance Agents' International Union, AFL-CIO,* 361 U. S. 477, 498-500 (1960). "[W]here Congress has adopted a selective system for dealing with evils, the Board [the Commission here] is confined to that system", *Local 357, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America* v. *National Labor Relations Board,* 365 U. S. 667, 676 (1961).

No amount of rationalization concerning the Commission's broad discretion or the deference due its expertise can alter the fact that Congress did not authorize Commission action on the basis of national antitrust policy.

(3) This Court has often pointed out that where Congress has selected the standards for approval by a regulatory agency of an otherwise anti-competitive agreement, such standards are to be applied and not those of the antitrust laws. *Minneapolis & St. Louis Railway Co.* v. *United States,* 361 U. S. 173 (1959); *Seaboard Air Line Railroad*

[69] H. Rep. 498, 87th Cong., 1st Sess., p. 40.

*Co.* v. *United States,* 382 U. S. 154 (1965); *Denver & Rio Grande Western Railroad Co.* v. *United States,* 387 U. S. 485 (1967).

Nor are any of the domestic antitrust cases cited by petitioners authority for the proposition that either conference rule may be disapproved without substantial evidence of any violation of the statutory standards selected by Congress. Nor do this Court's decisions in *Carnation Co.* v. *Pacific Westbound Conference, supra,* 383 U. S. 213 (1966) and *Federal Maritime Board* v. *Isbrandtsen Co.,* 356 U. S. 481 (1958) point to such a result.

In *Carnation,* this Court, applying the express prohibitions contained in Section 15 of the Shipping Act, held that the implementation of "agreements which have not been approved by the Federal Maritime Commission is subject to the antitrust laws" (*Id.* at 216). Here, of course, the conference agreements have received continuous Commission approval for upwards of 40 years (*supra,* p. 8, n. 17).

*Isbrandtsen* was concerned not with Section 15 of the Shipping Act but with Section 14, in which Congress outlawed practices of carriers committed individually or collectively, which were designed to stifle independent carrier competition. As demonstrated *supra,* pp. 31, 42, here there were no substantially supported "precise findings by the Board [Commission] as to" any predatory effect of the conference rules in question (*Id.* at 499). Indeed, the Commission's findings, to the extent supported by the record, completely negated conclusions that these rules operated in violation of the Shipping Act.

As this Court said in *Minneapolis, supra,* at 186:

> "Although § 5(11) [of the Interstate Commerce Act] does not authorize the Commission to 'ignore' the anti-

> trust laws, *McLean Trucking Co.* v. *United States*, 321 U. S. 67, 80, there can be 'little doubt that the Commission is not to measure proposals for [acquisitions] by the standards of the antitrust laws.' 321 U. S., at 85-86. The problem is one of accommodation of § 5(2) and the antitrust legislation."

This is what the Court of Appeals told the Commission in this case (*supra*, pp. 55-56); and, as this Court said in *Seaboard, supra* (*Id.* at p. 157), "[w]hether the Commission has confined itself within the statutory limits upon its discretion and has based its findings on substantial evidence" were precisely questions for the court below to decide. The Court of Appeals, therefore, was warranted in reversing the Commission's order because of the absence of any substantial evidence showing that the conference violated any Shipping Act standards. The court below correctly concluded, and petitioners' arguments here serve only to confirm, that the basis upon which the rules were disapproved was strict antitrust policy applied by the Commission contrary to the intent of Congress expressed in the Shipping Act.

## IV.

**ASTA's independent legal ground is neither substantiated nor reviewable.**

Throughout these proceedings ASTA contended there is "undisputed evidence in the record of relationships between respondents and their principal competitors, the international airlines, the existence of which renders the unanimity rule inherently illegal" and the identical contention is urged here as an independent ground upon which the Commission's order should have been affirmed by the Court of Appeals (A. Br. 49).

The Examiner considered and dismissed ASTA's contention, noting (R. 427):

> "As stated in the reply brief of Hearing Counsel, the purported evidence upon which ASTA asserts that there was concerted action between APC and the international airlines or between APC and other steamship conferences is remote and speculative and lacks probative weight. For these reasons the proposed finding on this issue cannot be adopted and these questions need not be discussed further in the Discussions and Conclusions section of this decision."

ASTA concedes "the record does not establish that unlawful concert of action has occurred between the sea and air carriers, * * *" (A. Br. 51). Its claim here is solely that there is evidence "of a proclivity for such cooperation" (*Id.* at 51).

An examination of the record references ASTA cites (A. Br. 49, 51-52) explains why the Commission and the Court of Appeals did not deem ASTA's contention even worthy of comment. The administrative order not having

been based on such a ground, it cannot be decided on such a basis now. *Burlington Truck Lines, Inc.* v. *United States,* 371 U. S. 156, 168-169 (1962). See also *National Labor Relations Board* v. *Metropolitan Life Insurance Co.,* 380 U. S. 438, 442-444 (1965).[70]

## CONCLUSION

**For the reasons stated, the judgment below should be affirmed.**

Respectfully submitted,

EDWARD R. NEAHER
*Counsel for Respondents*

CARL S. ROWE
GERTRUDE S. ROSENTHAL
*Of Counsel*

January 8, 1968.

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[70] ASTA's own cases, *Securities and Exchange Commission* v. *Chenery Corp.,* 318 U. S. 80 (1943); *Helvering* v. *Gowran,* 302 U. S. 238 (1937), and *Chae-Sik Lee* v. *Kennedy,* 111 App. D. C. 35, 38, 294 F. 2d 231, 234, cert. denied 368 U. S. 926 (1961), do not support this claim. The quotation from *Chenery* also contains the following significant language, also quoted by the Court in *Chae-Sik Lee*:

> "But it is also familiar appellate procedure that where the correctness of the lower court's decision depends upon a determination of fact which only a jury could make but which has not been made, the appellate court cannot take the place of the jury. *Like considerations govern review of administrative orders.* If an order is valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service for an administrative judgment" [emphasis supplied].

# APPENDIX A

## UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18554 September Term, 1964

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AKTIEBOLAGET SVENSKA AMERIKA LINIEN (SWEDISH-AMERICAN LINE), *et al.*,

*Petitioners,*

v.

FEDERAL MARITIME COMMISSION and UNITED STATES OF AMERICA,

*Respondents,*

AMERICAN SOCIETY OF TRAVEL AGENTS, INC. ("ASTA"),

*Intervenor.*

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On Petition for Review of a Final Order of the Federal Maritime Commission.

Before: Edgerton, Senior Circuit Judge, and Washington and Danaher, Circuit Judges.

### JUDGMENT

This case came on to be heard on the record from the Federal Maritime Commission, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court that this case is remanded to the Federal

Maritime Commission for reconsideration and with directions for further proceedings consistent with the opinion of this court.

Per Circuit Judge Washington.

Dated: June 10, 1965.

UNITED STATES COURT OF APPEALS
for the District of Columbia Circuit

FILED JUN 10 1965
/s/ NATHAN J PAULSON
CLERK